



## Department of Health

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Commissioner

SALLY DRESLIN, M.S., R.N.  
Executive Deputy Commissioner

January 15, 2019

**CERTIFIED MAIL - RETURN RECEIPT REQUESTED**

Sergey Gabinsky, M.D.



Amy T. Kulb, Esq.  
Jacobson Goldberg & Kulb, LLP  
585 Stewart Avenue, Suite 500  
Garden City, New York 11530

David W. Quist, Associate Attorney  
New York State Department of Health  
Bureau of Professional Medical Conduct  
Empire State Plaza  
Corning Tower Building, Room 2512  
Albany, New York 12237

**RE: In the Matter of Sergey Gabinsky, M.D.**

Dear Parties:

Enclosed please find the Determination and Order (No. 19-012) of the Professional Medical Conduct Administrative Review Board in the above referenced matter. This Determination and Order shall be deemed effective upon receipt or seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate. Delivery shall be by either **certified mail or in person** to:

Office of Professional Medical Conduct  
New York State Department of Health  
Riverview Center  
150 Broadway – Suite 355  
Albany, New York 12204

If your license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, you shall submit an affidavit to that effect. If subsequently you locate the requested items, they must then be delivered to the Office of Professional Medical Conduct in the manner noted above.

This exhausts all administrative remedies in this matter [PHL §230-c(5)].

Sincerely,

A black rectangular redaction box covering the signature of James F. Horan.

James F. Horan  
Chief Administrative Law Judge  
Bureau of Adjudication

JFH: cmg  
Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH  
ADMINISTRATIVE REVIEW BOARD FOR PROFESSIONAL MEDICAL CONDUCT

In the Matter of

Sergey Gabinsky, M.D. (Respondent)

Administrative Review Board (ARB)

A proceeding to review a Determination by a Committee  
(Committee) from the Board for Professional Medical  
Conduct (BPMC)

Determination and Order No. 19- 012

Before ARB Members D'Anna, Koenig, Grabiec, Wilson and Milone  
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner): David V. Quist, Esq.  
For the Respondent: Amy T. Kulb, Esq.

After an initial hearing in 2014, a BPMC Committee determined that the Respondent committed professional misconduct by engaging in conduct that resulted in the Respondent's Federal felony conviction. The Committee voted to revoke the Respondent's license to practice medicine in New York State (License). The Respondent then sought Administrative Review and asked the ARB to overturn the Committee's Determination or remand for further proceedings. A majority of the ARB voted to remand the case for additional proceedings. The Committee reconvened for a second hearing in July 2018 and issued a Supplemental Determination with a different sanction, which limited the Respondent's License and placed the Respondent on probation with a practice monitor. Following the Supplemental Determination, the Petitioner requested Review and asked the ARB to reinstate the revocation. After reviewing this record, the ARB rejects the request for revocation, but we modify the Supplemental Determination to place an additional limitation on the Respondent's License.

### Committee Determination on the Charges

Pursuant to PHL § 230 *et seq*, the BPMC and its Committees function as a duly authorized professional disciplinary agency of the State of New York. The BPMC Committee in this case conducted hearings under the expedited hearing procedures (Direct Referral Hearing) in PHL §230(10)(p). The Petitioner's Statement of Charges [Hearing Exhibit 1] alleged that the Respondent committed professional misconduct under the definition at New York Education Law (EL) §6530(9)(a)(ii) (McKinney 2018) by engaging in conduct that resulted in a conviction under Federal Law. The action against the Respondent began with an order from the Commissioner of Health suspending the Respondent's License summarily (Summary Order) pursuant to PHL § 230(12)(b). The Summary Suspension became effective February 12, 2014. In a Direct Referral Hearing, the statute limits the Committee to determining the nature and severity for the penalty to impose against the licensee, In the Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996).

Following the initial hearing, the Committee found that the evidence proved that the Respondent entered a guilty plea in United States District Court for the Southern District of New York to Conspiracy to Commit Health Care Fraud, a Federal felony, in violation of Title 18 USC § 371. The Respondent entered the plea on February 5, 2014, and on the same date, the Respondent entered into a Consent Order of Forfeiture/Money Judgment for \$2,000,000.00, representing the amount of the gross proceeds the Respondent supposedly obtained from the criminal activity for which the Respondent entered the guilty plea. The District Court sentenced the Respondent to twenty-four months imprisonment, three years supervised release and \$2,000,000.00 in restitution. The Court also required the Respondent to pay a \$100.00 assessment and recommended that the Respondent participate in a residential alcohol treatment program while incarcerated.

The Committee determined that the Respondent committed professional misconduct under EL § 6530(9)(a)(ii) by engaging in conduct that resulted in the Federal felony conviction. The Committee found that the Respondent's conviction resulted from the Respondent

establishing a corporation in Brooklyn to bill no-fault insurance companies fraudulently. The Committee concluded that the Respondent received pecuniary benefits for medical care the Respondent never provided to patients and that the Respondent abused the trust that the public places in a physician. The Committee indicated that they found nothing in the record that demonstrated the Respondent's remorse and nothing that indicated that the Respondent's future behavior would change for the better. The Committee concluded that License revocation provided the only penalty that would protect the public.

### The Initial Review

The Committee rendered their initial Determination on May 19, 2014 and the Respondent requested review. The Respondent took no issue with the Committee's conclusion that the Respondent's conviction provided the basis for finding professional misconduct. The Respondent requested, however, that the ARB either consider mitigating circumstances or remand to the Committee for reconsideration. The Respondent alleged no error by the Committee in assessing the record before the Committee, but rather the Respondent argued that the record before the Committee was incomplete. The Respondent explained that he was unable to appear due to his incarceration and unable to afford a lawyer to appear for the Respondent. The Respondent argued that if the Committee had the minutes from the plea and sentencing, the Committee could have seen that the Respondent showed genuine remorse, took full responsibility for his past behavior and made representations that he would never repeat such behavior. The Respondent also indicated that he would accept whatever less severe penalty available, such as suspension, practice restrictions and/or re-education.

The Petitioner replied that the Respondent was offering the ARB information from outside the hearing record. The Petitioner argued that the Respondent received notice about the

hearing and had ample opportunity to obtain counsel, appear by telephone or provide a written statement and other information to the Committee. The Petitioner noted that the Respondent's criminal conduct related directly to his medical practice. The Petitioner described the Committee's Determination as correct and the Petitioner requested that the ARB uphold the revocation.

After considering the hearing record and the parties' review submissions, the ARB voted 4-1 to remand the case to the Committee so the Respondent could have the opportunity to appear before and present mitigating evidence to the Committee. The majority found the record unclear as to what opportunities the Respondent had for presenting evidence from prison for the original hearing. The Respondent indicated that he was unaware of his options and lacked resources such as internet or telephone access. The penalty the Committee imposed remained in effect during the remand period.

#### Supplemental Determination

The Committee convened for the remand hearing on July 27, 2018. The Respondent testified on his own behalf and presented two character witnesses. The Committee's Administrative Officer also received into evidence the transcript from the initial hearing day. The Committee rendered their Supplemental Determination on September 11, 2018.

The Committee stated that fraud in the practice of medicine, standing alone, provides the grounds on which to revoke a medical license. The Committee indicated that they voted for revocation in 2014 because there was no evidence of remorse or any indication that the Respondent's future behavior would change for the better. After reviewing the evidence from the

remand hearing, the Committee still questioned whether the Respondent felt genuine remorse for his participation in a fraudulent conspiracy or rather for the impact the Respondent's conduct had upon his life and family. The Committee concluded that the Respondent likely knew that his conduct was fraudulent when he engaged in the activity and the Respondent was motivated by greed and the belief he would not be caught. The Committee was unconvinced about whether the Respondent would repeat his fraudulent conduct if given the opportunity.

The Committee did note that the Respondent served a significant penalty for his misconduct, which kept the Respondent away from medical practice for more than five years. The Committee indicated that they were persuaded that the Respondent had been a competent pediatrician, who could provide skilled medical services if monitored by another physician. The Committee indicated that after balancing all the factors, they concluded that they could impose a penalty that would return the Respondent to practicing pediatrics while monitored, but prevent the Respondent from using his License for any illegal financial gain. The Committee voted to limit the Respondent's License to bar the Respondent from owning a professional corporation and to preclude the Respondent, either individually or through a professional corporation, from evaluating, treating or billing patients whose medical services are reimbursed through either No-Fault Insurance or Workers' Compensation. The Committee also placed the Respondent on probation for two years under terms that appear as an attachment to the Committee's Determination. Those terms include practice with a monitoring physician, who is board certified in pediatrics.

### Supplemental Determination on Review

The ARB Remand Order provided that either party could seek review over the Supplemental Determination. The Petitioner requested review on September 17, 2018. The record for review contained the record from the initial hearing, the first ARB proceeding, the remand hearing, the Petitioner's Brief and the Respondent's reply brief. The record closed when the ARB received the Reply Brief on October 29, 2018.

The Petitioner's Brief argues that the Respondent received the opportunity at the remand hearing to present mitigating evidence, but the Committee questioned whether the Respondent had really presented mitigation. Despite the Committee's question, they voted to reduce the penalty that they had imposed following the initial hearing. The Petitioner contends that the reduced penalty has no support in the Committee's reasoning from the Supplemental Determination. The Petitioner asks that ARB overturn the Committee and re-impose the revocation of the Respondent's License.

The Respondent's Reply recited his personal history such as his education and licensure in Russia, his emigration to America and his practice of pediatrics here, which never involved problems. In addition to the pediatric practice, the Respondent worked in an outside practice, Gaba Medical PC, that involved reading and signing the reports and submitting range of motion testing and functional muscle testing, performed by machines, and ordered by other physicians for patients mostly involved in motor vehicle accidents. The Respondent never self-referred any of the patients. The Respondent's participation with the outside practice resulted in his guilty plea to conspiracy to commit health care fraud, twenty-four months incarceration and three years under supervised release. The Respondent noted that he took responsibility for his acts, paid his



debt to society and kept his knowledge of pediatrics up to date. He also discussed ongoing involvement with community service activities. The Respondent stated that if he could return to practice he would limit himself strictly to pediatrics and would take no part in owning a business or in activities outside a private practice location. The Reply Brief also discussed character witnesses the Respondent presented and argued that the character testimony corroborated the Respondent's remorse and insight. The Respondent asked that the ARB uphold the penalty the Committee imposed in the Supplemental Determination.

#### ARB Authority

Under PHL §§ 230(10)(i), 230-c(1) and 230-c(4)(b), the ARB may review Determinations by Hearing Committees to determine whether the Determination and Penalty are consistent with the Committee's findings of fact and conclusions of law and whether the Penalty is appropriate and within the scope of penalties which PHL § 230-a permits. The ARB may substitute our judgment for that of the Committee, in deciding upon a penalty Matter of Bogdan v. Med. Conduct Bd. 195 A.D.2d 86, 606 N.Y.S.2d 381 (3<sup>rd</sup> Dept. 1993); in determining guilt on the charges, Matter of Spartalis v. State Bd. for Prof. Med. Conduct 205 A.D.2d 940, 613 NYS 2d 759 (3<sup>rd</sup> Dept. 1994); and in determining credibility, Matter of Minielly v. Comm. of Health, 222 A.D.2d 750, 634 N.Y.S.2d 856 (3<sup>rd</sup> Dept. 1995). The ARB may choose to substitute our judgment and impose a more severe sanction than the Committee on our own motion, even without one party requesting the sanction that the ARB finds appropriate, Matter of Kabnick v. Chassin, 89 N.Y.2d 828 (1996). In determining the appropriate penalty in a case, the ARB may consider both aggravating and mitigating circumstances, as well as considering the protection of

society, rehabilitation and deterrence, Matter of Brigham v. DeBuono, 228 A.D.2d 870, 644 N.Y.S.2d 413 (1996).

The statute provides no rules as to the form for briefs, but the statute limits the review to only the record below and the briefs [PHL § 230-c(4)(a)], so the ARB will consider no evidence from outside the hearing record, Matter of Ramos v. DeBuono, 243 A.D.2d 847, 663 N.Y.S.2d 361 (3<sup>rd</sup> Dept. 1997).

A party aggrieved by an administrative decision holds no inherent right to an administrative appeal from that decision, and that party may seek administrative review only pursuant to statute or agency rules, Rooney v. New York State Department of Civil Service, 124 Misc. 2d 866, 477 N.Y.S.2d 939 (Westchester Co. Sup. Ct. 1984). The provisions in PHL §230-c provide the only rules on ARB reviews.

#### Determination

The ARB affirms the Committee's Determination that the Respondent committed professional misconduct. Neither party disputed the Committee's findings on the charges. The ARB rejects the Petitioner's request that we overturn the Committee and revoke the Respondent's License. We affirm the Committee's Determination to limit the Respondent's License and to place the Respondent on probation for two years, under terms that include a practice monitor. On our own motion, we modify the Committee's Determination to include an additional restriction. We limit the Respondent to the practice of pediatric medicine.

We reject revocation as a penalty because the Respondent has already endured a heavy sentence under the criminal conviction by spending two years in prison and three years on supervised release. The Respondent has also been away from the practice of medicine for almost

five years from the time of the Respondent's summary suspension from practice in February 2014 and the License revocation under the Committee's initial Determination. Further, the Respondent's misconduct involved the outside practice in Gaba Medical PC rather than the Respondent's practice as a pediatrician. The penalty the Committee imposed bars the Respondent from ownership in a professional medical corporation and for billing for services through No-Fault Insurance or Workers' Compensation. The probation the Committee ordered also requires the Respondent to practice with a monitor certified in pediatrics. The Respondent's Brief argued that the Respondent had remained up to date in his knowledge of pediatric practice. The ARB feels that the monitoring can test whether the Respondent has indeed remained up to date. The ARB finds one addition necessary to the penalty.

The ARB may choose to substitute our judgment and impose a more severe sanction than the Committee on our own motion, even without one party requesting the sanction that the ARB finds appropriate, Matter of Kabnick v. Chassin, (supra). The ARB substitutes our judgment in this case and limits the Respondent to the practice of pediatrics. The Respondent's Reply Brief notes that he experienced no problems in practicing pediatrics and notes further that the Respondent kept up his knowledge about pediatrics during his years away from practice. The Reply also accepted the penalty the Committee imposed in the Supplemental Determination, including practice with a monitor board certified in pediatrics. We conclude that the limitation to pediatric practice provides the last necessary step to fashion the appropriate sanction in this case.

ORDER

NOW, with this Determination as our basis, the ARB renders the following ORDER:

1. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB upholds the penalty the Committee imposed in their Supplemental Determination, with one modification.
3. The ARB votes to limit the Respondent's License to the practice of pediatric medicine.

Peter S. Koenig, Sr.  
Steven Grabiec, M.D.  
Linda Prescott Wilson  
John A. D'Anna, M.D.  
Richard D. Milone, M.D.



In the Matter of Sergey Gabinsky, M.D.

Linda Prescott Wilson, an ARB Member, affirms that she took part in the deliberations in this case and that the attached Determination reflects the decision by the ARB in the Matter of Dr. Gabinsky.

Dated: 11 January, 2019

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Linda Prescott Wilson

In the Matter of Sergey Gabinsky, M.D.

John A. D'Anna, M.D., an ARB Member, affirms that he took part in the deliberations in this case and that this Determination reflects the decision by the ARB in the Matter of Dr. Gabinsky.

Dated: Jan 9, 2019



John A. D'Anna, M.D.

In the Matter of Sergey Gabinsky, M.D.

Steven Grabiec, M.D., an ARB Member, affirms that he took part in the deliberations in this case and that this Determination reflects the decision by the ARB in the Matter of Dr. Gabinsky.

Dated: 1/10, 2019



Steven Grabiec, M.D.



In the Matter of Sergey Gabinsky, M.D.

Richard D. Milone, an ARB Member, affirms that he took part in the deliberations in this case and that this Determination reflect the decision by the ARB in the Matter of Dr. Gabinsky.

Dated: June 9, 2019

  
Richard D. Milone, M.D.

In the Matter of Sergey Gabinsky, M.D.

Peter S. Koenig, Sr., an ARB Member, affirms that he took part in the deliberations in this case and that this Determination reflects the decision by the ARB in the Matter of Dr. Gabinsky.

Dated: January 9, 2019

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Peter S. Koenig, Sr.